



DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 30

[178A2100DD/AAKC001030 /A0A501010.999900 253G]

Bureau of Indian Education Standards, Assessments, and Accountability System

Negotiated Rulemaking Committee Establishment; Nominations

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Request for Nominations and Notice of Intent to Establish Committee.

SUMMARY: The U.S. Department of the Interior is announcing its intent to establish the Bureau of Indian Education (BIE) Standards, Assessments, and Accountability System Negotiated Rulemaking Committee (Committee) to advise the Secretary of the Interior (Secretary) through the BIE on a proposed rule to revise the Adequate Yearly Progress regulation and invite Tribes whose students attend BIE-funded schools operated by either the BIE or by the Tribe through a contract or grant who would be affected by the final rule to nominate a representative for membership on the Committee. The BIE also invites nominations for Committee members who will adequately represent the interests that are likely to be significantly affected by the proposed rule such as: Students enrolled, or parents of students enrolled at the 174 BIE-funded schools, school teachers and administrators, Tribes, and Indian communities served by these schools. The BIE also solicits comments on the proposal to establish the Committee.

DATES: Comments regarding the intent to establish this Committee and nominations for Committee members must be submitted no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Send written comments to Ms. Juanita Mendoza, Bureau of Indian Education, by any of the following methods:

- (Preferred method) Email to: BIEcomments@bia.gov;
- Mail, hand-carry or use an overnight courier service to Ms. Juanita Mendoza, Bureau of Indian Education, 1849 C Street, NW, Mail Stop 4657, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Mendoza, Bureau of Indian Education; telephone: (202) 208-3559.

SUPPLEMENTARY INFORMATION:

I. Background

In 2005, BIA promulgated regulations at 25 CFR part 30 that require BIE to use the accountability system of the State in which a BIE-funded school is located. There are BIE-funded schools in 23 different States; and each State has its own accountability system. As a result, each State system produced student achievement data that cannot be directly compared with data from other States. This created problems for the BIE in identifying under-performing schools and in directing resources effectively.

On November 9, 2015, BIE published a notice of intent requesting nominations for a negotiated rulemaking committee to recommend revisions to the existing regulations for BIE's accountability system (80 FR 69161). In that notice of intent, the BIE solicited nominations from Tribes whose students attend BIE-funded schools operated either by

the BIE or by the Tribe through a contract or grant, to nominate Tribal representatives to serve on the Committee and Tribal alternates to serve when the representative is unavailable.

The Every Student Succeeds Act (ESSA), Pub. L. 114-95, then became law, requiring an update to the subject, scope, and issues that the Committee would address. On April 14, 2016 (81 FR 22039), BIE announced its intent to expand the scope of the Committee and reopened the comment and nomination period, requesting comments and nominations by May 31, 2016. The request for nominations was extended on August 17, 2016 (81 FR 54768). On January 18, 2017 a notice of proposed membership, request for nomination and a request for comments was published (82 FR 5473).

Taking into consideration the interests of the new Administration in participating in this process, the Department has decided that a new negotiated rulemaking process, as required by the ESEA, should begin.

Under ESEA Section 8204(c)(2), as amended, Tribes have the authority to waive, in part or in whole, the definitions of standards, assessments, and accountability system established by the Secretary in accordance with this rulemaking. The BIE encourages Tribal self-determination in Native education; and where a Tribal governing body or school board determines it to be appropriate, encourages the development of alternative standards, assessments, or accountability systems.

The Committee would be charged, consistent with ESEA Section 8204, with developing proposed regulations for implementation of the Secretary's responsibility to define standards, assessments, and an accountability system. These definitions will be implemented in the 2018-2019 school year. The final regulations will describe how to

execute the Secretary's responsibility to define the standards, assessments, and an accountability system consistent with ESEA Section 1111, for schools funded by the BIE on a national, regional, or Tribal basis, as appropriate, taking into account the unique circumstances and needs of such schools and the students served by such schools. Additionally, the Committee will be asked to provide recommendations that encourage the exercise of the authority of Tribes to adopt their own standards, assessments, and an accountability system and also to provide recommendations on how BIE could best provide technical assistance under ESEA Section 8204(c)(3).

II. Every Student Succeeds Act (ESSA)

The ESSA reauthorizes and amends the ESEA. ESSA Section 8007 amends ESEA Section 8204, and directs the Secretary of the Interior, in consultation with the Secretary of Education, if so requested, to use a negotiated rulemaking process to develop regulations for implementation of the Secretary of the Interior's obligation to define the standards, assessments, and an accountability system that will be utilized at BIE-funded schools. The regulations, along with any necessary revisions to part 30 generally, will replace the existing 25 CFR part 30 and will define the standards, assessments, and an accountability system consistent with ESEA, for BIE-funded schools on a national, regional, or Tribal basis. The regulations will be developed in a manner that considers the unique circumstances and needs of such schools and the students served by such schools. These definitions will be implemented in the 2018-2019 school year.

ESEA Section 8204 also provides that if a Tribal governing body or school board of a BIE-funded school determines the requirements established by the Secretary of the

Interior are inappropriate, they may waive, in part or in whole, such requirements. Where such requirements are waived, the Tribal governing body or school board shall, within 60 days, submit to the Secretary of the Interior a proposal for alternative standards, assessments, and an accountability system, if applicable, consistent with ESEA Section 1111. The proposal must take into account the unique circumstances and needs of the school or schools and the students served. The proposal will be approved by the Secretary of the Interior and the Secretary of Education, unless the Secretary of Education determines that the standards, assessments, and accountability system do not meet the requirements of ESEA Section 1111. Additionally, a Tribal governing body or school board of a BIE-funded school seeking a waiver may request, and the Secretary of the Interior and the Secretary of Education will provide, technical assistance.

III. Statutory Authority

This document is published in accordance with the Negotiated Rulemaking Act of 1996 (NRA) (5 U.S.C. 561 *et seq.*); the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2); and the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. 6301 *et seq.*)

IV. The Committee and its Process

In negotiated rulemaking, recommended provisions of a proposed rule are developed by a committee composed of at least one representative of the Federal Government and representatives of the interests that will be significantly affected by the rule. Decisions are made by consensus, which means unanimous concurrence among the interests

represented on the Committee, unless the Committee agrees to define “consensus” to mean a general but not unanimous concurrence, or agrees upon another specified definition. 5 U.S.C. 562(2)(A) and (B).

As part of the negotiated rulemaking process, the BIE has identified interests potentially affected by the rulemaking under consideration, including students enrolled at 174 BIE-funded schools, parents of such students, school administrators, Tribes, and the Indian communities served by these schools. By this notice of intent, the BIE is soliciting: (1) Comments on its proposal to form a negotiated rulemaking committee; and (2) nominations for Committee members who will adequately represent the interests that are likely to be significantly affected by the proposed rule.

Following the receipt of nominations and comments, BIE will publish a second notice in the *Federal Register* with a list of persons to represent the interests that are likely to be significantly affected by the rule and the person or persons proposed to represent the BIE. Persons who will be significantly affected by the proposed rule and who believe that their interests will not be adequately represented by any person specified in that second *Federal Register* notice will be given an opportunity to apply or nominate another person for membership on the Committee to represent such interests with respect to the proposed rule.

Following the second *Federal Register* notice and responses to it, BIE expects to establish the Committee. After the Committee reaches consensus on the recommended provisions of the proposed rule, as discussed in more detail below, the BIE will publish a proposed rule in the *Federal Register*.

Under 5 U.S.C. 563, the head of the agency is required to determine that the use of the negotiated rulemaking procedure is in the public interest.

In making such a determination, the agency head must consider certain factors. Taking these factors into account, the Secretary, through the authority delegated to the Assistant Secretary – Indian Affairs, has determined that a negotiated rulemaking is in the public interest because:

1. A rule is needed. The ESEA directs the Secretary to conduct a negotiated rulemaking pursuant to the NRA.
2. A limited number of identifiable interests will be significantly affected by the rule. The 174 BIE-funded schools, students enrolled at these schools, school teachers and administrators, Tribes, and Indian communities served by these schools will be significantly affected by this review and the recommendations made by this Committee.
3. There is a reasonable likelihood that the Committee can be convened with a balanced representation of persons who can adequately represent the interests discussed in item 2, above, and who are willing to negotiate in good faith to attempt to reach a consensus on provisions of a proposed rule.
4. There is a reasonable likelihood that the Committee will reach consensus on a proposed rule within a fixed period of time.
5. The use of negotiated rulemaking will not delay the development of a proposed rule because time limits will be placed on the negotiation. We anticipate that these negotiations will expedite a proposed rule and ultimately the acceptance of a final rule.
6. The BIE is making a commitment to ensure that the Committee has sufficient resources to complete its work in a timely fashion.

7. The BIE, to the maximum extent possible and consistent with the legal obligations of the Agency, will use the consensus report of the Committee as the basis for a proposed rule for public notice and comment.

V. Negotiated Rulemaking Procedures

In compliance with FACA and NRA, the BIE will use the following procedures and guidelines for this negotiated rulemaking. The BIE may modify them in response to comments received on this notice of intent or during the negotiation process.

A. Committee Formation

The Committee will be formed and operated in full compliance with the requirements of FACA and NRA, and specifically under the guidelines of its charter.

B. Membership Responsibility

The Committee is expected to meet approximately 3–5 times and will last 2–3 days each. The initial meeting will be in person; some later meetings may be held by teleconference and/or web conference. The Committee’s work is expected to occur over the course of 6–12 months. However, the Committee may continue its work for up to two years.

Because of the scope and complexity of the tasks at hand, Committee members must be able to invest considerable time and effort in the negotiated rulemaking process. Committee members must be able to attend all Committee meetings, work on Committee work groups, consult with their constituencies between Committee meetings, and negotiate in good faith toward a consensus on issues before the Committee. Because of the complexity of the issues under consideration, as well as the need for continuity, the

Secretary reserves the right to replace any member who is unable to participate in the Committee's meetings.

Responsibility for expenses under 5 U.S.C. 568(c) is as follows:

Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an Agency may, in accordance with Section 7(d) of the FACA, pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if—

1. Such member certifies a lack of adequate financial resources to participate in the Committee; and

2. The agency determines that such member's participation in the Committee is necessary to assure an adequate representation of the member's interest.

The BIE commits to pay the reasonable travel and per diem expenses of Committee members, if appropriate, under the NRA and Federal travel regulations.

C. Composition of Committee

The Secretary is seeking nominations for representatives to serve on the Committee who can represent the interests of students enrolled at the 174 BIE-funded schools, parents of such students, school administrators, Tribes, and the Indian communities served by these schools, and who have a demonstrated ability to communicate well with groups about the interests they will represent. The Committee membership will consist of approximately 15, but not more than 25 members in accordance with the NRA.

Non-Federal Committee membership must:

- Include only representatives of the interests described above;

- Comply with the FACA.

41 CFR 102-3.30 requires the membership of a FACA committee to be fairly balanced in its member in terms of the points of view represented and the functions to be performed. In making membership decisions, the Secretary shall consider whether the interest represented by a nominee will be affected significantly by the final products of the Committee, which may include report(s) and/or proposed regulations; whether that interest is already adequately represented by nominees; and whether the potential addition would adequately represent that interest.

Federally registered lobbyists are ineligible to serve on all FACA and non-FACA boards, committees, or councils in an individual capacity. The term “individual capacity” refers to individuals who are appointed to exercise their own individual best judgment on behalf of the government, such as when they are designated Special Government Employees, rather than being appointed to represent a particular interest.

D. Administrative and Technical Support

The BIE will provide sufficient administrative and technical resources for the Committee to complete its work in a timely fashion. The BIE, with the help of the facilitator, will prepare and provide a final report of any issues on which the Committee reaches consensus.

E. Training and Organization

At the first meeting of the Committee, a neutral facilitator will provide training on negotiated rulemaking, interest-based negotiations, and consensus-building. In addition, at the first meeting, Committee members will make organizational decisions concerning protocols, scheduling, and facilitation of the Committee.

F. Interests Identified

Under Section 562 of the NRA, “interest” means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.’ The BIE has identified the interests to be significantly affected by this new rule to include students enrolled at 174 BIE-funded schools, parents of such students, school administrators, Tribes, and the Indian communities served by these schools. The BIE is accepting comments identifying other interests that may be significantly affected by the final products of the Committee, which may include report(s) and/or proposed regulations, until the date listed in the **DATES** section of this notice of intent.

VI. Nominations

The BIE solicits nominations from representatives of the interests identified above and an alternate to serve when the representative is unavailable.

Each nomination is expected to include a nomination for a primary representative and an alternate who can fulfill the obligations of membership should the primary representative be unable to attend. The Committee membership should reflect a diversity of interests, and nominees should only be of representatives and alternates who will:

- Have knowledge of school standards, assessments and accountability systems;
- Have relevant experience as past or present superintendents, principals, teachers, or school board members;

- Be able to coordinate, to the extent possible, with other interests who may not be represented on the Committee;
- Be able to represent one or more of the specified interests with the authority to embody the views of that interest, communicate with interested constituents, and have a clear means to reach agreement on behalf of the interest(s);
- Be able to negotiate effectively on behalf of the interest(s) represented;
- Be able to commit the time and effort required to attend and prepare for meetings; and
- Be able to collaborate among diverse parties in a consensus-seeking process.

The BIE will consider nominations for representatives only if they are nominated through the process identified in this Notice of Intent. The BIE will not consider any nominations that we receive in any other manner. If you submitted a nomination in response to previous notices (80 FR 69161; 81 FR 22039; 81 FR 54768; 82 FR 5473) you must submit a new nomination package. Previous applications will not be considered. The BIE will not consider nominations for Federal representatives. Only the Secretary may nominate Federal employees to the Committee.

Nominations must include the following information about each nominee:

- (1) A current letter from the entity representing one of the interest(s) identified supporting the nomination of the individual to serve as a representative for the Committee;
- (2) A resume reflecting the nominee's qualifications and experience in Indian education; resume to include the nominee's name, Tribal affiliation (if applicable), job

title, major job duties, employer, business address, business telephone and fax numbers (and business email address, if applicable);

(3) The interest(s) to be represented by the nominee (see section V, part F) and whether the nominee will represent other interest(s) related to this rulemaking; and

(4) A brief description of how the nominee will represent the views of the identified interest(s), communicate with constituents, and have a clear means to reach agreement on behalf of the interest(s) they are representing.

(5) A statement on whether the nominee is only representing one interest or whether the expectation is that the nominee represents a specific group of interests.

To be considered, nominations must be received by the close of business on the date listed in the **DATES** section, at the location indicated in the **ADDRESSES** section.

PUBLIC AVAILABILITY OF COMMENTS: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

VII. Certification

For the above reasons, I hereby certify that the Bureau of Indian Education Standards, Assessments, and Accountability System Negotiated Rulemaking Committee is in the public interest.

AUTHORITY: 20 USC 6301
5 USC 561
5 USC Appendix 2

Dated: September 1, 2017.

Michael S. Black,

Acting Assistant Secretary – Indian Affairs.

BILLING CODE 4337-15-P

[FR Doc. 2017-19111 Filed: 9/13/2017 8:45 am; Publication Date: 9/14/2017]